Supreme Court, U.S.
FILED
JUN - 6 1994
OFFICE OF THE CLERK

No. 93-1683

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

V.M. WHEELER III, Petitioner

v.

KIDDER, PEABODY & CO. INCORPORATED

and

GENERAL ELECTRIC CO., Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

V.M. WHEELER III
1201 McDuffie Street #161
Houston, Texas 77019
Telephone: (713) 522-3957

Counsel for the Petitioner,
Pro Se

QUESTIONS PRESENTED

1. Whether an arbitration provision, otherwise enforceable in accordance with the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 2, is unenforceable and void for public policy as an unconstitutional waiver of the right to trial by jury under the Seventh Amendment to the United States Constitution, U.S.C.A. Const. Amend. VII, when such provision constitutes one sentence of fine print among a multiple-page, standardized, pre-printed contract between parties far from equal in bargaining power, where such contract is presented to an officer of a corporation by his employer as a condition of his employment prior to any controversy arising, where there is no opportunity for the individual to negotiate over the terms of such contract, and where the individual has no choice other than to accept the contract as written.

2. Whether the lower courts erred in the application of Texas state law in dismissing petitioner's Federal suit on grounds of collateral estoppel and by applying the doctrine of res judicata to an interlocutory order of the Texas state court.

3. Whether the lower courts sanctioned a departure by the Texas state court from the accepted and usual course of judicial proceedings in its denial to petitioner of his statutory right to a jury trial on issues relating to the making of a purported arbitration agreement.

PARTIES TO THIS ACTION

The parties to these proceedings are the petitioner, V.M. Wheeler III, and the respondents, Kidder, Peabody & Co. Incorporated ("Kidder") and General Electric Co. ("GE").

A list naming all known parent companies and subsidiaries of respondents Kidder and GE appears as Appendix A.

TABLE OF CONTENTS

I. QUESTIONS PRESENTED i

II. PARTIES TO THIS ACTION ii

III. TABLE OF AUTHORITIES iv

IV. STATEMENT OF THE CASE 1

V. PETITIONER'S REPLY TO RESPONDENTS' REASONS THE PETITION SHOULD BE DENIED 3

A. Issues Presented For Consideration By This Court 3

B. Prior Appeal Of The Seventh Amendment Issue 5

C. Important Or Special Claims Or Issues 6

D. District Court's Violation Of Petitioner's Seventh Amendment Right To Trial By Jury 6

E. Petitioner's Purported Failure To Produce Sufficient Evidence To Require A Jury Trial On Arbitrability 8

F. Court Of Appeals Error In Its Application Of Texas Law 9

VI. CONCLUSION 10

VII. APPENDICES

List Naming All Known Parent Companies And Subsidiaries Of Respondents Kidder, Peabody & Co. Incorporated And General Electric Co. ..... A

Order Of Reinstatement, Dated May 24, 1994, By The 190th Judicial District Court Of Harris County, Texas ..... B

TABLE OF AUTHORITIES

Cases

Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) 5
Hodges v. Easton, 106 U.S. 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882) 7
Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937) 7
Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) 7
National Equipment Rental Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977) 7
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) 7
Dillard v. Merrill Lynch, Pierce, Fenner & Smith, 961 F.2d 1148 (5th Cir. 1992) 8, 9
Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51 (3rd Cir. 1980) 8, 9
Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985) 9
Anglin Co., Inc. v. Arthur Tipps, 842 S.W.2d 266 (Tex. 1992) 10

Constitutional Provision

United States Constitution, Amendment VII 3, 4, 5

Statutes And Rules

Fed. R. Civ. P. 9(b) 2, 3
9 U.S.C.A. Section 1, et seq 4, 5, 6
9 U.S.C.A. Section 4 9
Tex. R. Civ. P. 162 9

STATEMENT OF THE CASE

Petitioner takes exception to several assertions in Respondents' statement of the case in their Brief In Opposition (the "Brief In Opposition").

First, while petitioner agrees that the lawsuit at issue in these proceedings (the "Federal Suit") is the third suit filed against various combinations of Kidder, GE and Nancy Quinn ("Quinn"), this lawsuit is the first suit filed by petitioner against Kidder and GE. *See,* Brief In Opposition, at 1, *where respondents claim that this suit is the third lawsuit filed by petitioner challenging the arbitration provision.*

Although petitioner challenged the arbitration provision in each of the suits referenced by respondents, neither of the two prior lawsuits originally sought affirmative relief with respect to the purported arbitration provision, and his pleadings with respect thereto in the prior two lawsuits constituted responses to efforts by the respective defendant(s) therein to shift the adjudicative forum to arbitration. Furthermore, the Federal Suit is distinct from the prior suits in that it includes claims not heretofore alleged against Kidder, GE or Quinn.

Respondents assert that each of the National Association of Securities Dealers, Inc., the New York Stock Exchange and the American Stock Exchange "has rules, constitutions, and by-laws that require petitioner's underlying dispute with respondents to be arbitrated." Brief In Opposition, at 1. Respondents' statement is immaterial to the issues presented by petitioner to this Court and presents a conclusion of law which has not yet been finally adjudicated in any legal proceedings.

Respondents state, "***In contravention of this arbitration agreement*** ..., petitioner filed three lawsuits against various combinations of Kidder, [GE], ... and Nancy Quinn ... " (Emphasis Added) Brief In Opposition, at 1-2. Respondents' statement presents conclusions of law on issues which have yet to be finally adjudicated.

Respondents state that, at the conclusion of the state court's hearing on the defendants' motion to compel arbitration in the first

lawsuit against Kidder and Quinn, "**the state court ruled that petitioner *knowingly* signed an arbitration agreement** and ordered him to arbitrate all of his disputes against both Kidder and Quinn." (Emphasis Added) Brief In Opposition, at 2.

While petitioner was not present at that hearing, he is unaware of any ruling that he "knowingly signed an arbitration agreement." Absent citation to some record of this ruling, reference by respondents to any ruling on petitioner's state of mind at the time of his execution of the purported arbitration agreement has been improperly placed before this Court.

Respondents assert that the state court dismissed the "Second Lawsuit" for want of prosecution. Brief In Opposition, at 3. The state court subsequently reinstated that lawsuit under an Order which ruled that the suit previously had been dismissed in error. (App. B)

Respondents declare, "Petitioner added GE as a party to [the Federal Suit] **in a *blatant attempt* to avoid both the arbitration agreement and the orders in the First Lawsuit**." (Emphasis Added) Brief In Opposition, at 3. Respondents' statement merely expresses their opinion and has not been proven before any court of law. This unfounded reference to Petitioner's purported state of mind has been improperly placed before this Court.

Finally, respondents state,

> The district court found GE's 9(b) motion, along with the other motions, "meritorious". Order of Dismissal, at D-1 of Petition. Petitioner did not appeal this part of the district court's decision. Accordingly, regardless of the Court's ruling on the Petition, the district court's dismissal of GE from the suit should be affirmed.

Brief In Opposition, at 4, Footnote 1.

Respondents' claim is without merit. In his brief to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"),

petitioner addresses this precise issue at great length. On Pages 23-26 of his Fifth Circuit brief, petitioner argues, in pertinent part,

> Although Judge Hoyt stated, in effect, that he had elected not to dismiss the Complaint against G.E. under RICO for failure to state a cause of action, the Order of Dismissal states that the District Court found G.E.'s motion to dismiss to be meritorious ... Doubtless no degree of specificity in pleading would be satisfactory to G.E. The motion to dismiss nevertheless ignored three qualifications to the particularity requirement of Rule 9(b) ... Even by the most strict interpretations of Rule 9(b), Wheeler's allegations outline the essential circumstances of fraud
> ...

Based upon the foregoing, it is clear that petitioner, in fact, did appeal this issue.

PETITIONER'S REPLY TO RESPONDENTS' REASONS THE PETITION SHOULD BE DENIED

A.
Issues Presented For Consideration By This Court

Respondents artfully avoid any response to the specific Seventh Amendment issue raised by petitioner and attempt to misdirect the attention of this Court to the broad question of the general enforceability of arbitration agreements.

Respondents submit that the issue before this Court is whether an arbitration provision in a Uniform Application For Securities Industry Registration Or Transfer Form U-4 violates petitioner's rights under the Seventh Amendment. Brief In Opposition, at (i). That question is quite different from the issue advanced to this Court by petitioner.

In his Petition, petitioner frames the issue before this Court,

> **Whether an arbitration provision,** ***otherwise enforceable in accordance with the Federal Arbitration Act,*** **... is unenforceable and void** for public policy as an unconstitutional waiver of the right to trial by jury under the Seventh Amendment ..., **when** such **provision constitutes one sentence of fine print among a multiple-page, standardized, pre-printed contract** between **parties far from equal in bargaining power, where** such **contract is presented** to an officer of a corporation by his employer **as a condition of** his **employment prior to any controversy** arising, where there is **no opportunity for** the **individual to negotiate over** the **terms** of such contract, and **where** the **individual has no choice other than to accept** the **contract as written**.

(Emphasis Added) Petition, at (i).

Petitioner's issue focuses on the ***validity and effectiveness of*** an individual's ***consent to*** a purported ***waiver of*** the ***right to jury trial, specifically*** when the purported ***waiver is buried in fine print among multiple pre-printed pages of a standardized contract*** between two ***parties far from equal in bargaining power*** and where the ***standardized contract*** is ***presented amidst a flurry of*** employment orientation ***documentation as a condition of employment following*** that individual's ***resignation from*** his ***prior employer*** and when the purported Constitutional ***waiver was neither bargained for nor discussed*** by the parties.

Petitioner's question specifically addresses the ***effectiveness and validity of consents to Constitutional waivers*** which are extracted from one party by another of far greater bargaining power when ***inadequate, at best, disclosure of*** the ***waiver, or the effects thereof,*** is made to the party against whom waiver is sought.

Petitioner states in his Petition,

> While ***Petitioner*** has never challenged, and ***does not challenge***, the Constitutionality of the ***Federal Arbitration Act***, ... the ***effectiveness of waivers*** of individuals' rights to jury trial ***which are properly obtained through*** the ***valid consent*** of parties against whom such waivers are sought to be enforced, or the ***validity of*** the ***purported contract as a whole***, Petitioner respectfully submits that the purported waiver of his right to jury trial in question in these proceedings falls far short of the ***Constitutional safeguards*** which have been adopted by this Court and other Federal courts of this land.

(Emphasis Added) Petition, at 6.

Clearly, respondents would rather focus this Court on the validity of arbitration provisions in the broad context of the Seventh Amendment where the jurisprudence affords great deference to arbitration agreements, in contrast to addressing the specific question presented by petitioner.

B.

Prior Appeal Of The Seventh Amendment Issue

Respondents argue that petitioner first raised the Seventh Amendment issue in his Petition. Brief In Opposition, at 5.

Petitioner respectfully submits that respondents again have attempted to divert the attention of this Court. While this Court is not precluded from considering issues first raised before it, *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), a review of petitioner's Fifth Circuit briefs demonstrates that petitioner addressed the issues of waiver and the right to jury trial in the lower courts. Many arguments by petitioner in his appeal focused on respondents' requirement to fully disclose the nature and character of the purported waiver and the effects thereof.

While the Seventh Amendment is not mentioned with specificity by petitioner's now deceased former counsel, respondents are well

aware that the issues surrounding the effectiveness of the purported waiver of the right to jury trial clearly formed an integral component of petitioner's argument to the Fifth Circuit.

C.
Important Or Special Claims Or Issues

Respondents submit that, "Petitioner has failed to raise any claims that are important or special to anyone other than the parties." Brief In Opposition, at 6.

Respondents' argument barely merits a reply. The question presented by petitioner to this Court involves a ***pre-printed, standardized contract*** which is ***required for execution by the "tens of thousands" of individuals*** professionally engaged in the securities industry in this country. Precisely what respondents would like to accomplish is to shift the attention of this Court from the fact that ***this issue is common to thousands of individuals*** either currently, or previously, employed by Kidder.

The issue in question is neither specific nor particular to petitioner, but, in fact, ***is important to all "registered" employees and former employees*** who are, or may become, ***subject to disputes with*** Kidder and/or other ***securities industry employers***. More broadly defined, ***the issue presented*** by petitioner to this Court ***impacts, or potentially impacts, every "registered" employee in this nation's securities industry***.

D.
District Court's Violation Of Petitioner's Seventh Amendment Right To Trial By Jury

Respondents note, "the Court should not 'indulge every reasonable presumption against waiver' of the right to a jury, as requested by Petitioner ... Quite the contrary, the Federal Arbitration Act establishes a 'liberal Federal policy favoring arbitration agreements.' ... Any 'doubts concerning the scope of arbitration issues should be resolved in favor of arbitration.'" Brief In Opposition, at 8-9.

Respondents' position is contrary to the decisions by this Court in *Hodges v. Easton*, 106 U.S. 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882), and *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937), where this Court held that courts must indulge every reasonable presumption against waiver of the fundamental right to trial by jury.

While petitioner agrees that there is substantial statutory authority and jurisprudence establishing a liberal Federal policy favoring arbitration agreements, the cases cited by respondents indicate that the issue to which this policy generally is applied focuses on the "availability" of arbitration and the "scope" of arbitrable issues, rather than on the effectiveness and validity of consents to waivers of the right to jury trial.

Respondents fail to cite any authority for the proposition that the "liberal Federal policy favoring arbitration agreements" supersedes, or reverses, the long-standing precedent that Constitutional waiver provisions are enforceable only if entered into knowingly, intentionally and voluntarily. *Leasing Service Corp. v. Crane*, 804 F.2d 828 (4th Cir. 1986); *National Equipment Rental Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977) To so hold, this Court would have to reverse, or at least limit, its prior decision in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), where it refused to sustain a contractual provision which waived Constitutional rights when there was no showing that the parties against whom waiver was sought were aware, or made aware, of the significance of the fine print relied upon as a waiver of Constitutional rights.

The question before this Court is not whether the claims asserted by petitioner would be arbitrable under a valid arbitration agreement or whether the claims are within the scope of the purported arbitration provision. The issue is whether the purported arbitration provision is unenforceable and void for public policy as a result of respondents' failure to obtain ***valid and effective consent to a waiver*** of the fundamental right to trial by jury.

E.
Petitioner's Purported Failure To Produce Sufficient Evidence To Require A Jury Trial On Arbitrability

Respondents assert that "Petitioner failed to produce sufficient evidence to require a jury trial on arbitrability ... At a minimum, petitioner 'must produce at least some evidence to substantiate his factual allegations.'" Brief In Opposition, at 9-10.

Petitioner concurs that he, at a minimum, must produce "at least some evidence to substantiate his factual allegations." The requirement, however, is to produce "some evidence" and is not to prove, either beyond a reasonable doubt or by a preponderance of the evidence, that the "making" of the purported arbitration agreement is at issue. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith*, 961 F.2d 1148 (5th Cir. 1992); *Par-Knit Mills v. Stockbridge Fabrics*, 636 F.2d 51 (3rd Cir. 1980)

Petitioner was not present at the evidentiary hearing referenced by respondents. Petitioner did produce, however, his affidavit ("Petitioner's Affidavit") as to the circumstances surrounding his execution of the purported arbitration agreement.

Petitioner's Affidavit notes, in pertinent part,

> To the best of my recollection, I did not sign the Form U-4, Uniform Application for Industry Registration or Transfer, in the form that it was presented to the court ... At the time ... that I signed a U-4 Form for Kidder Peabody, I had no intent or contemplation that matters such as post-termination disputes between Kidder Peabody and myself ... could possibly be subject to arbitration under the terms of the U-4 Form. There was no discussion and I was never advised of the position with respect to arbitration set forth in Defendants' motion to stay this lawsuit and compel arbitration. My understanding of industry practice was that arbitration provisions are generally applicable to broker/dealer employees for the purposes of

requiring the employee's participation in ["customer-related" arbitration].

As respondents never have challenged the veracity of Petitioner's Affidavit, petitioner respectfully submits that he, in fact, did meet the standard required under 9 U.S.C.A. Section 4 for invoking a jury trial on the question of the "making" of the purported arbitration agreement and the validity thereof. See, *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866 (7th Cir. 1985); *Dillard*, supra; *Par-Knit Mills*, supra.

F.

Court Of Appeals Error In Its Application Of Texas Law

Respondents assert that their motion to compel arbitration meets the standards of a "claim for affirmative relief" under Texas state law, so as to preclude the effects of petitioner's nonsuit pursuant to Tex. R. Civ. P. 162 (Vernon 1994). Brief In Opposition, at 12-13. Even accepting, for the sake of argument, respondents' assertion as correct, while petitioner argues to the contrary in his Petition, it clearly would be manifestly unjust and unfair to permit respondents, on one hand, to prevent petitioner from invoking the jurisdiction of the courts for the resolution of his disputes, and on the other, to seek "affirmative relief" in a court of law.

Respondents state, "On its face, the docket sheet shows that the state court was aware that petitioner had nonsuited his claims before signing the second order." Brief In Opposition, at 13. Respondents fail to mention, however, that the "first order" of the state court could not have been a "final" order, and clearly must have been "preliminarily rendered" in anticipation of a formal written order, as the same entry on this docket sheet further provides that the state court expected the defendants to "submit [an] appropriate order" following such hearing.

Respondents further declare that petitioner's counsel conceded, during a scheduling conference in the Federal Suit, that the "purpose of nonsuiting the First Lawsuit was to forum shop". Brief In Opposition, at 16.

While the true intent of petitioner's attorney in nonsuiting petitioner's first suit probably never will be ascertained, as petitioner's counsel now is deceased, respondents claim constitutes an insulting extrapolation of the late Mr. Franklin's expression of his legal opinion that a party would have ***the right*** under Texas state law to nonsuit a case if the party goes to court and obtains an unwanted result. No mention is made by Mr. Franklin in the transcript from the scheduling conference in the Federal Suit of his specific intent with respect to the nonsuiting of petitioner's lawsuit against Kidder and Quinn.

Finally, respondents note that the Fifth Circuit properly rejected the argument that the state court orders in petitioner's suit against Kidder and Quinn were not "final judgments" under Texas state law. Brief In Opposition, at 18. The holdings of the authorities cited in the Petition are to the contrary, *Anglin Co., Inc. v. Arthur Tipps*, 842 S.W.2d 266 (Tex. 1992), and the "propriety" of the Fifth Circuit's decision is before this Court.

For all other issues raised by respondents in their Brief In Opposition, petitioner respectfully refers this Court to the arguments, and the authorities in support thereof, outlined in his Petition.

CONCLUSION

For the reasons stated above, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

V. M. Wheeler III

V.M. WHEELER III
1201 McDuffie Street #161
Houston, Texas 77019
Telephone: (713) 522-3957

Counsel for the Petitioner,
Pro Se

APPENDIX A

List Naming All Known Parent Companies And Subsidiaries Of Respondents Kidder, Peabody & Co. Incorporated And General Electric Co.

1. *General Electric Co.*

   A. General Electric Co. does not have any parent corporations.
   B. The following companies are subsidiaries of General Electric Co.:
   General Electric Company
   G.E. Aircraft Engines
   Marine & Industrial Engines & Services Div.
   G.E. Appliances (A General Electric Co.)
   Roper Corporation
   RGE Corporation
   G.E. Capital Fleet Services (Operation of General Electric Corp.)
   G.E. Communications Services
   General Electric Information Systems Co.
   G.E. Electric Distribution & Control Manufacturing
   G.E. Industrial Power Systems
   G.E. Industrial & Power Systems Sales
   G.E. Nuclear Energy
   G.E. Power Delivery Division
   G.E. - Hitachi HVB, Inc.
   Bayou Cogeneration
   G.E. Lighting
   G.E. Toshiba Lighting Corporation
   G.E. Medical Systems
   G.E. Plastics
   G.E. Specialty Chemicals
   G.E. Plastics - America
   Plastics Manufacturing Div.
   Plastic Sales Div.
   G.E. Silicones
   G.E. Superabrasives
   Silicone Products Div.

G.E. Trading Company
General Electric Supply Co. Div.
GE/Fanuc Automation North America
GE Transportation Systems
General Electric Financial Services, Inc.
Decimus Corp.
Employers Reinsurance Corp.
G.E. Capital Corporation
G.E. Capital Fleet Services
Building & Trailer Services
G.E. Capital McCullagh
Gelco Travel Services, Inc.
Creative Media
Gelco CTI Container Services, Inc.
Gelco Fleet Mngmt.
Gelco Fleet & Management Services Company
Gelco International Corp.
Gelco Space
TIP - Transport International Pool
G.E. Capital Vendor Financial Services
Eastman Kodak Credit Corporation
G.E. Capital Mortgage Services
General Electric Railcar Services Corp.
General Electric Railcar Repair Services Corp.
Kidder, Peabody Group Inc.
Polaris Aircraft Leasing Corporation
G.E. Environmental Systems
National Broadcasting Co., Inc.
CNBC
Patrick Media Group, Inc.
United Pacific Life Insurance Company

2. *Kidder, Peabody & Co. Incorporated*

   A. The parent company of Kidder, Peabody & Co. Incorporated is Kidder, Peabody Group Inc.
   B. Kidder, Peabody & Co. Incorporated does not own any subsidiaries that are not wholly-owned.

NO. 92-25527

Wheeler, V.M. III	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
Quinn, Nancy K.	190TH JUDICIAL DISTRICT

ORDER

On May 24, 1994, it having been brought to the attention of the court that the above styled cause was dismissed for want of prosecution in error, it is therefore

ORDERED, ADJUDGED AND DECREED that this cause is reinstated on the COURT'S docket.

Signed May 24, 1994.

/s/ Eileen F. O'Neill
JUDGE PRESIDING